

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL TUTTLE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security  
Administration<sup>1</sup>,

Defendant.

NO: 12-CV-3035-TOR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 15 and 19). Plaintiff is represented by D. James Tree.

<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Under Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 Defendant is represented by Carol A. Hoch. The Court has reviewed the  
2 administrative record and the parties' completed briefing and is fully informed.  
3 There being no reason to delay a decision, the hearing set for March 24, 2014, is  
4 vacated and this matter is submitted without oral argument. For the reasons  
5 discussed below, the Court will grant Plaintiff's motion, deny Defendant's motion,  
6 and remand the case to the Commissioner for an award of benefits.

### 7 JURISDICTION

8 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);  
9 1383(c)(3).

### 10 STANDARD OF REVIEW

11 A district court's review of a final decision of the Commissioner of Social  
12 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is  
13 limited: the Commissioner's decision will be disturbed "only if it is not supported  
14 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
15 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means  
16 relevant evidence that "a reasonable mind might accept as adequate to support a  
17 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,  
18 substantial evidence equates to "more than a mere scintilla[,] but less than a  
19 preponderance." *Id.* (quotation and citation omitted). In determining whether this  
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1 standard has been satisfied, a reviewing court must consider the entire record as a  
2 whole rather than searching for supporting evidence in isolation. *Id.*

3 In reviewing a denial of benefits, a district court may not substitute its  
4 judgment for that of the Commissioner. If the evidence in the record “is  
5 susceptible to more than one rational interpretation, [the court] must uphold the  
6 ALJ’s findings if they are supported by inferences reasonably drawn from the  
7 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
8 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
9 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]  
10 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).  
11 The party appealing the ALJ’s decision generally bears the burden of establishing  
12 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 13 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

14 A claimant must satisfy two conditions to be considered “disabled” within  
15 the meaning of the Social Security Act. First, the claimant must be “unable to  
16 engage in any substantial gainful activity by reason of any medically determinable  
17 physical or mental impairment which can be expected to result in death or which  
18 has lasted or can be expected to last for a continuous period of not less than twelve  
19 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
20 “of such severity that he is not only unable to do his previous work[,], but cannot,

1 considering his age, education, and work experience, engage in any other kind of  
2 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
3 1382c(a)(3)(B).

4 The Commissioner has established a five-step sequential analysis to  
5 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
6 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner  
7 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
8 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
10 404.1520(b); 416.920(b).

11 If the claimant is not engaged in substantial gainful activities, the analysis  
12 proceeds to step two. At this step, the Commissioner considers the severity of the  
13 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
14 claimant suffers from “any impairment or combination of impairments which  
15 significantly limits [his or her] physical or mental ability to do basic work  
16 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
17 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
18 however, the Commissioner must find that the claimant is not disabled. *Id.*

19 At step three, the Commissioner compares the claimant’s impairment to  
20 several impairments recognized by the Commissioner to be so severe as to

1 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§  
2 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
3 severe than one of the enumerated impairments, the Commissioner must find the  
4 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

5 If the severity of the claimant's impairment does meet or exceed the severity  
6 of the enumerated impairments, the Commissioner must pause to assess the  
7 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
8 defined generally as the claimant's ability to perform physical and mental work  
9 activities on a sustained basis despite his or her limitations (20 C.F.R. §§  
10 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the  
11 analysis.

12 At step four, the Commissioner considers whether, in view of the claimant's  
13 RFC, the claimant is capable of performing work that he or she has performed in  
14 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);  
15 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the  
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
17 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the  
18 analysis proceeds to step five.

19 At step five, the Commissioner considers whether, in view of the claimant's  
20 RFC, the claimant is capable of performing other work in the national economy.

1 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,  
2 the Commissioner must also consider vocational factors such as the claimant's age,  
3 education and work experience. *Id.* If the claimant is capable of adjusting to other  
4 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
5 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
6 work, the analysis concludes with a finding that the claimant is disabled and is  
7 therefore entitled to benefits. *Id.*

8 The claimant bears the burden of proof at steps one through four above.  
9 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If  
10 the analysis proceeds to step five, the burden shifts to the Commissioner to  
11 establish that (1) the claimant is capable of performing other work; and (2) such  
12 work "exists in significant numbers in the national economy." 20 C.F.R. §§  
13 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

#### 14 ALJ'S FINDINGS

15 Plaintiff filed concurrent applications for child disability insurance benefits  
16 and supplemental security income on August 14, 2007, alleging a disability onset  
17 date of December 1, 2005. Tr. 15. The applications were denied initially and upon  
18 reconsideration. Tr. 15. A hearing was held at Plaintiff's request on April 15,  
19 2010, before Administrative Law Judge Riley Atkins. The ALJ rendered a  
20 decision denying Plaintiff benefits on April 27, 2010. Tr. 15-25. The ALJ

1 concluded at step one that Plaintiff had not engaged in substantial gainful activity  
2 since the alleged onset date. Tr. 17. At step two, the ALJ found that Plaintiff had  
3 severe impairments consisting of borderline intellectual functioning, dysthymic  
4 disorder, and substance abuse in remission. Tr. 17. At step three, the ALJ found  
5 that Plaintiff's severe impairments did not meet or medically equal any of the  
6 listings found in 20 C.F.R. Pt. 404, Subpt. P, App'x 1. Tr. 18. At step four, the  
7 ALJ found that Plaintiff had the residual functional capacity to perform a full range  
8 of work at all exertional levels, with the caveats that he perform routine, repetitive,  
9 unskilled work, that he have no contact with the public and only minimal contact  
10 with co-workers, and that he be assigned to work alone rather than part of a team.  
11 Tr. 20. At step five, the ALJ concluded that there were a significant number of  
12 jobs existing in the national economy which Plaintiff could perform in view of his  
13 residual functional capacity and denied his claims on that basis. Tr. 24-25. The  
14 Appeals Council subsequently denied Plaintiff's request for review on January 20,  
15 2012, making the ALJ's decision the Commissioner's final decision for purposes  
16 of judicial review. Tr. 5-7; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

## 17 ISSUES

18 Plaintiff raises four issues for review:

- 19 1. Whether the ALJ erred in finding that Plaintiff's severe impairments did not  
20 meet or medically equal Listing 12.05C (mental retardation);

2. Whether the ALJ erred in failing to include certain cognitive and social functioning impairments identified by Dr. Lyon in the hypothetical posed to the vocational expert;
3. Whether the ALJ erred in discrediting Plaintiff's testimony; and
4. Whether the ALJ erred in discrediting Plaintiff's mother's lay testimony.

## DISCUSSION

### **A. Listing 12.05C – Mental Retardation**

To satisfy the criteria for mental retardation under Listing 12.05C, a plaintiff must demonstrate (1) deficits in adaptive functioning which manifested prior to age twenty-two; (2) a valid verbal, performance, or full scale IQ score between 60 and 70; and (3) a separate physical or mental impairment that imposes an additional and significant work-related limitation of function. 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1205. The ALJ found that Plaintiff was not disabled under this Listing because (1) Plaintiff's two IQ scores within the applicable range were "invalid," and (2) Plaintiff did not have a separate impairment that imposed an additional and significant work-related limitation of function. Tr. 19-20. Defendant concedes that the latter finding was erroneous. ECF No. 20 at 7. Accordingly, the only remaining issue is whether the ALJ erred in disregarding Plaintiff's IQ scores.

Having thoroughly reviewed the record, the Court finds that the ALJ erred declaring Plaintiff's IQ test scores "invalid." Contrary to the ALJ's findings, the



1 psychologist who administered the testing, Dr. Lawrence Lyon, did not “question  
2 the validity” of the test results. Rather, Dr. Lyon simply noted the possibility that  
3 the results may have slightly under-represented Plaintiff’s true level of intellectual  
4 functioning and rendered a diagnosis accordingly:

5 Mr. Tuttle was alert and oriented to person, place, time  
6 and situation. He was generally cooperative with the  
7 evaluation and made fair eye contact with the examiner.  
8 He put forth fair effort toward the tasks expected of him.  
9 At times he did not appear to persist on tasks. As can be  
10 seen from the testing results, Michael’s Verbal Scale IQ  
11 score [of 72] falls in the Borderline range, while his  
12 Performance Scale and Full Scale IQ scores [of 67] fall at  
13 the upper end of the Mildly Retarded range. Based on the  
14 above observations regarding his slightly poor task  
15 persistence, it is estimated that he currently functions in  
16 the Borderline range of intellectual functioning. Good  
17 consistency was shown among his subtest scores, lending  
18 credence to the current assessment.

19 Tr. 184. Given that Plaintiff was “generally cooperative” and “put forth fair effort”  
20 during the testing, the fact that he exhibited “slightly poor task persistence” was  
not a valid basis for categorically rejecting his IQ scores.

Moreover, the ALJ’s finding that Plaintiff “was observed to be ‘nonchalant  
and lackadaisical’ upon testing” is not supported by substantial evidence. Tr. 20.  
The portions of Dr. Lyon’s evaluation upon which the ALJ apparently relied in  
reaching this finding read as follows:

[Mr. Tuttle] arrived on time for his appointment. . . . He  
was dressed in casual clothing appropriate for the  
weather including a T-shirt and corduroy pants. His

1 hygiene and grooming were fair. He had a couple days'  
 2 growth of beard. . . . He **presented in a somewhat**  
 3 **lackadaisical manner**, and showed little in the way of  
 4 social graces [by] sniffing, clearing his throat, yawning  
 5 and stretching. His movements were lethargic and he  
 6 appeared somewhat tired and dragged out.

7 \* \* \*

8 Mr. Tuttle demonstrated a range of affect; his affect was  
 9 generally appropriate to the topic at hand, though he  
 10 tended to smirk at times suggesting some attitude issues.  
 11 **For the most part, his affect was nonchalant and**  
 12 **lackadaisical.** He said his mood is not too good, and that  
 13 he is stressed out about whether he will get help with his  
 14 rent and tooth problems. . . . He said he has felt at times  
 15 that life was not worth living but has never tried to end  
 16 his life.

17 Tr. 184 (emphasis added). These comments do not support the ALJ's conclusion  
 18 that Plaintiff was "nonchalant and lackadaisical" *about the IQ testing*. At best,  
 19 these comments indicate that Plaintiff acted somewhat casually throughout the  
 20 interview. As noted above, however, Dr. Lyon specifically found that Plaintiff was  
 "generally cooperative" and "put forth fair effort" on the IQ test. Tr. 184. The  
 ALJ's finding to the contrary was clearly erroneous.

Finally, the ALJ's rejection of Plaintiff's IQ scores is not supported by other  
 evidence in the record. To the contrary, the record reflects—and the ALJ  
 acknowledged—that Plaintiff "was previously determined to meet eligibility  
 requirements for mental retardation (as defined by Washington State) through  
 school testing in 1997 and 2001." Tr. 21. Accordingly, this is not a case in which

1 the ALJ was permitted to “discredit [Plaintiff’s] IQ scores based on other evidence  
2 contradicting them.” *Hancock v. Astrue*, 667 F.3d 470, 475 (4th Cir. 2012). Had  
3 the ALJ not improperly rejected Plaintiff’s IQ scores, Plaintiff would have satisfied  
4 Listing 12.05C. Thus, the case will be remanded for an award of benefits.

### 5 **B. Step Five Challenge**

6 The Court’s ruling above renders Plaintiff’s remaining challenges moot.  
7 Nevertheless, the Court deems it appropriate to address Plaintiff’s argument that  
8 the ALJ failed to satisfy his burden at step five. Plaintiff is correct; the ALJ erred  
9 in failing to include certain cognitive and social functioning impairments identified  
10 by Dr. Lyon in the hypothetical posed to the vocational expert. On a form attached  
11 to his narrative report, Dr. Lyon found that Plaintiff suffered from (1) moderate  
12 limitations in his ability to learn new tasks; (2) moderate limitations in his ability  
13 to respond appropriately to and tolerate the pressure and expectations of a normal  
14 work setting; (3) marked limitations in his ability to understand, remember and  
15 follow complex instructions; and (4) marked limitations in his ability to exercise  
16 judgment and make decisions. Tr. 189.

17 Curiously, despite affording “significant weight” to Dr. Lyon’s opinions, *see*  
18 Tr. 23, the ALJ failed to include these limitations in the hypothetical posed to the  
19 vocational expert at step five. Defendant suggests that the ALJ implicitly rejected  
20 these limitations based upon Dr. Lyon’s observation that “appropriate training

1 [and]/or education would likely result in improved job skills.” Tr. 190. The  
2 problem, of course, is that an implicit rejection of such findings is plainly  
3 insufficient. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (“[T]he  
4 Commissioner must provide ‘clear and convincing’ reasons for rejecting the  
5 uncontradicted opinion of an examining physician.”).

6 When Plaintiff’s counsel supplemented the hypothetical with the restrictions  
7 identified by Dr. Lyon above, the vocational expert opined that Plaintiff would be  
8 precluded from finding other work existing in significant numbers in the national  
9 economy. Tr. 329-31. Accordingly, Plaintiff is entitled to a remand for an award  
10 of benefits on this alternative ground as well.

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**IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment (ECF No. 15) is **GRANTED**.
2. Defendant's Motion for Summary Judgment (ECF No. 19) is **DENIED**.
3. This case is **REVERSED** and **REMANDED** to the Commissioner for calculation of benefits consistent with this Order pursuant to the fourth sentence of 42 U.S.C. § 405(g).
4. The hearing set for March 24, 2014, is **VACATED**.
5. Plaintiff may file an application for attorney's fees and costs by separate motion.

The District Court Executive is hereby directed to file this Order, enter Judgment for Plaintiff, provide copies to counsel, and **CLOSE** the file.

**DATED** May 20, 2013.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge